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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 191

THE UNITED STATES,
Appellant,
against
KATE B. GOLTRA and E. FIELD GOLTRA, JR.,
Executors of the Estate of Edward F. Goltra, deceased,
Appellees.

No. 192

KATE B. GOLTRA and E. FIELD GOLTRA, JR.,
Executors of the Estate of Edward F. Goltra, deceased,
Cross-Appellants,
against
THE UNITED STATES,
Cross-Appellee.

ON APPEAL AND CROSS APPEAL FROM THE UNITED STATES COURT OF CLAIMS

BRIEF OF APPELLEES—CROSS-APPELLANTS

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December 3, 1940

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OPINION OF THE COURT BELOW

The decision and opinion of the Court of Claims appear at R. 29-56 and are not yet officially reported.

JURISDICTION OF THIS COURT

This case is here on appeal and cross-appeal pursuant to the terms of the special jurisdictional act providing (R. 14-15) "That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof . . . ." The final judgment of the Court of Claims is dated April 1, 1940 (R. 29, 56). The cross-appelants' petition (R. 58), assignment of errors (R. 59), order allowing cross-appeal (R. 62) and request for record (R. 63) were filed in this court on or before June 25, 1940 (R. 58, 59, 62, 63). Probable jurisdiction was noted on October 14, 1940. Out of an abundance of caution, both parties also filed petitions for writs of certiorari. As there is an appeal and cross-appeal, the appellees cross-appellants who were plaintiffs below will be designated simply as plaintiffs and the appellant cross-appellee will be referred to as the United States.

THE SPECIAL JURISDICTIONAL ACT

The special jurisdictional act under which the Court of Claims acted is as follows (48 Stat., c. 150, p. 1322) (R. 29-30):

"AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, that jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

THE ISSUES ON THE APPEALS

Neither party appeals from the judgment of the Court of Claims in plaintiffs' favor on the merits. The United States appeals (R. 57) from that part of the judgment which awards a sum measured by interest, described by the court as an award "not as interest but as a part of just compensation" (R. 49, 55). Plaintiffs contend that the taking of Goltra's property for public use required the award of just compensation, including a sum measured by interest, under the decisions interpretive of the Fifth Amendment

and by reason of the direction in the Special Jurisdictional Act to pay just compensation. The plaintiffs base their cross-appeal (R. 59-62) on the ground that the principal sum awarded as part of just compensation is inadequate, particularly because the court below (1) failed to take into consideration the rental or productive value of the property taken as well as other relevant factors such as the cost value and expected life of the fleet, and (2) refused to consider an offer made to rent the property, although this offer was fully proved by testimony of the offeror as well as offeree, without objection on the part of the United States when the evidence was introduced (R. 66-68).

STATEMENT OF THE CASE

The Record on these appeals contains, in addition to the findings and opinion of the court (R. 29-56) a stipulation as to certain facts, signed by the Solicitor General, in lieu of the extensive record made before the Commissioner of the Court of Claims. (R. 66-82.)

The facts as found by the Court of Claims on the merits are unchallenged by either party and we review them briefly for an understanding of the contentions as to the nature and amount of recovery.

A. *On the Merits.*

Edward F. Goltra conducted certain experiments in river transportation in cooperation with the United States to assist in solving the acute transportation problems created by the first World War (Finding 3, R. 30). The result of his experiments were reported to the President and enabled the Corps of Engineers of the Army to prepare specifications for a Mississippi River fleet, which Goltra

offered to take over and operate upon completion (Finding 3, R. 30).

Thereafter, as a wartime measure, the United States contracted for the construction of a fleet of nineteen steel barges and four steel towboats (Finding 4, R. 30). The barges were substantial vessels of 300 foot length and 48 foot beam; each was capable of carrying 3,000 tons of solid or liquid cargo (Finding 15, R. 35). The barges were "the most advanced in type of any river barge constructed" (Finding 15, R. 35). Each barge cost $110,000 and that was approximately its value at the time of the Government's seizure, which forms the basis of this controversy (R. 66-67).

Each towboat was of 300 foot length and 58 foot beam and was equipped with an engine rated at approximately 2,000 horsepower (Finding 15, R. 35). The average cost of the towboats was $375,000 each, and that was the approximate value of the boats at the time of the seizure (R. 66-67).

While the fleet was under construction, on May 28, 1919, Goltra and the United States, acting through the Chief of Engineers, entered into a contract, referred to as the original contract (Finding 6, R. 31). On May 26, 1921, the same parties entered into a supplemental contract (Finding 6, R. 31), relating principally to unloading facilities to be used in connection with the operation of the fleet. The contracts (R. 15-23) gave Goltra, as lessee, the right to possess and operate on the Mississippi River and its tributaries, for a term of five years from date of delivery, the fleet of nineteen steel barges and four towboats and the right to possess and operate the unloading facilities (R. 16, 20-23). The only rental payable was to consist of

the net earnings of the fleet. These net earnings were to be credited to the purchase price of the fleet and unloading facilities if Goltra exercised an option conferred upon him in the contracts to purchase the fleet and unloading facilities at an appraised value (R. 17-19, 22). Under this option provision, the balance of the purchase price was payable in fifteen equal annual installments (R. 19).

The contracts were subject to cancellation only if, in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (R. 15, 19-20; Opinion, R. 50).

Before the fleet was completed and delivered to Goltra, the United States established under the Secretary of War a barge line of its own on the Mississippi River (Finding 8, R. 31). The existence of this competing barge line led to difficulties between Goltra and the Secretary of War, under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13, 14; R. 32-34). The Government line was permitted by the Secretary of War to carry all available freight at 80% of the prevailing rail rates (Finding 8, R. 31-32). Originally Goltra had been given permission to carry freight on the same basis (Finding 9, R. 32), but, as the time for the delivery of the fleet approached in March, April and May, 1922, the Secretary of War rescinded the permission previously given and, after plaintiff protested, permitted the 80% rate to be charged only for freight which the Government line could not carry (Findings 11, 12, 13, 14; R. 33-34). The Secretary of War stated his position to be that he "could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges" (Finding 11, R. 33).

The fleet was finally delivered to Goltra at St. Louis on July 15, 1922 (Finding 15, R. 34). The towboats at that time had certain defects in mechanism which had to be remedied by Goltra (Finding 16, R. 35). Goltra operated the fleet after its delivery to him, although he was hampered not only by the defects in the towboats but also by the unprecedented low water conditions on the Mississippi and the attitude which the Secretary of War had taken (Finding 17, R. 35-36; Finding 35, R. 42; Opinion, R. 54).

During this period of operation the court stated that Goltra operated the fleet "to the best advantage" and that "There was no complaint or protest by the lessor of the operation of the fleet . . ." (Opinion, R. 51). In December, 1922, with the approval and consent of the United States District Engineer, Goltra placed the fleet in winter quarters, as was customary at that time in St. Louis, in order to avoid the hazards of winter navigation and to prevent damage to the fleet from ice and other winter elements (Finding 18, R. 36-37; Opinion R. 51). At the time when the fleet was thus placed in winter quarters "It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923" (Opinion, R. 51).

While the fleet was so disposed, the Secretary of War was apparently casting about for means of taking the fleet from Goltra because, in January, 1923, he sent a memorandum to the Chief of Engineers stating, with reference to the Goltra contract "According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity", and he requested the District Engineer to include in future reports information necessary to establish

the Government's right to cancel the Goltra contract in the event that any breach of contract could be discovered (Finding 20, R. 37).

Before navigation opened up in the spring of 1923 and while the Goltra fleet was still properly in winter quarters, the Government having taken no steps to order Goltra to remove the fleet from such quarters, the Secretary of War, on March 3, 1923, purported to exercise the discretion vested by Goltra's contract in the Chief of Engineers (Finding 23, R. 39). The Secretary of War transmitted to Colonel Ashburn, who was Chief of the competing Government barge line, written instructions to deliver to Goltra a letter in which the Secretary of War purported to cancel Goltra's contracts and demand the delivery of the fleet and the unloading facilities to Colonel Ashburn (Finding 23, R. 39). Goltra refused to comply with the Secretary of War's demand (Finding 25, R. 40).

Thereafter, and still prior to the time when navigation was resumed on the Mississippi River at St. Louis, the Acting Secretary of War on March 22, 1923 authorized Colonel Ashburn to take possession of the Goltra fleet (Finding 27, R. 41; Finding 32, R. 42). The United States District Engineer at St. Louis, who "did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats",[1] described the action taken by Ashburn as follows in a telegram to the Chief of Engineers (Opinion, R. 52):

> "'Col. Ashburn with the Federal Barge Line towboat Vicksburg and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and

[1]Finding 30, R. 41.

one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *.'"

The Court of Claims in its findings described the seizure of the fleet by Ashburn as follows (Finding 28, R. 41):

> "On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States."[1]

Litigation seeking injunctive relief immediately followed the Government's seizure (Finding 36, R. 43). The fleet, however, remained in the custody of the United States until September, 1924 (Finding 37, R. 43). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39, R. 44), but after further court action the injunction was dissolved (Finding 40, R. 44). Since that time "Defendant [United States] has retained possession of the boats and barges . . . and has caused the same to be operated as a part of the Mississippi Warrior Service [the competing Government line]" (Finding 40, R. 44).

The Court of Claims has found that Goltra, prior to the seizure of the fleet, had performed all his obligations under the contracts (Findings 32, 33, 34, 35, R. 42;

[1] See also Opinion, R. 52.

Opinion, R. 51). Furthermore, the court found that the Chief of Engineers, to whom had been entrusted the determination of whether Goltra had or had not performed his contracts, at no time formed a judgment that Goltra had not performed his obligations hereunder (Finding 31, R. 41; Finding 38, R. 44; Opinion R. 53). Accordingly, the Court of Claims concluded that the seizure of the fleet was improper and that the plaintiffs herein are entitled under the special jurisdictional act to just compensation for the consequences of the Government's actions (R. 49, 53).

Although there is no challenge to the court's decision in plaintiffs' favor on the merits, we point out that the decision of the Court of Claims is wholly consistent in principle with the decision of this Court in the injunction proceeding (*Goltra* v. *Weeks*, 271 U. S. 536). This Court in that decision assumed that the Chief of Engineers had properly exercised his discretion to cancel the Goltra contract. The facts now found and undisputed show that the letter purporting to cancel the contracts, written more than a month after the seizure (Finding 38, R. 43-44), was not written by the Chief of Engineers in the exercise of his own judgment, but that he was "coerced . . . in signing the order cancelling the contract" (Finding 38, R. 44; Opinion, R. 53). The Court of Claims said (R. 53):

> "The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract."

For further discussion of the former decision by this Court and the reasons prompting the present Jurisdictional Act,

we refer to the Congressional Committee reports (Appendix A, *infra,* pp. i-xii, especially pp. iv-v, viii-x).

Plaintiffs' second cause of action relates to the unloading facilities covered by the Supplemental Contract (R. 21-22). Pursuant to this contract, Goltra had provided a tract of land and concrete runways on the bank of the Mississippi River at St. Louis (Finding 50, R. 45-46), and the Government had erected thereon and leased to Goltra a very substantial traveling crane of ten-ton capacity to be used in connection with loading and unloading the barges (Finding 50, R. 46). After the seizure of the fleet, the unloading crane remained on Goltra's concrete runways and land and remains there to the present time (Finding 52, R. 46-47). It is obviously a useless encumbrance on Goltra's property, and Goltra was deprived of its contemplated use in connection with the operation of the fleet.

B. *As to the Amount of Recovery.*

The court awarded the principal sum of $350,000 to the plaintiffs, together with interest, "not as interest but as a part of just compensation" (R. 49, 55-56). The sum was arrived at after taking into account counterclaims in the sum of approximately $7,600 (Findings 54-56, R. 47-49). Accordingly, the court determined that just compensation, as of the date of the seizure, was approximately $357,600. Of this total the court's findings show that $187,736.99 consisted of sums actually expended in connection with the contracts, including sums for improving the fleet and repairing damage done to the fleet by the Government, the construction of concrete runways required by the Supplemental Contract, as well as other expenses incidental to Goltra's performance of the contract (Find-

ings 43, 44, 45, 46, 47, 48, 50, R. 45-46).[1] For these expenditures Goltra was never reimbursed and the United States benefited thereby when it took the property (Findings just cited, and *cf.* Finding 33, R. 42). Thus only about $170,000 was found to be the injury done to Goltra by the seizure of the fleet, the unloading facilities and the destruction of his contract rights.

The small amount of the recovery allowed, the failure to make findings which had been made by the Commissioner and requested by the plaintiffs, and the court's opinion, all indicate that the court failed to give any effect to elements of value which, under the cases, plaintiffs believe should have been considered in determining the amount of just compensation (R. 59-62, and *cf.* Opinion R. 54). We refer to these briefly here.

The average cost of the towboats concededly was $375,000 each and the average cost of the barges was $110,000 each (R. 66). The approximate cost of the fleet of nineteen barges and four towboats was $3,590,000; that was approximately its value at the time of the seizure (R. 66-67).

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[1]This total is an addition of expenditures embodied in findings as follows:

Finding 43	$ 6,414.28
" 44	1,027.23
	732.11
" 45	7,140.89
" 46	5,038.44
" 47	79,474.52
" 48	30,830.30
	21,017.73
" 50	36,061.49
	$187,736.99

The United States concedes as true the fact that Standard Oil Company of Louisiana offered to rent the Goltra fleet in May, 1925, when Goltra was in possession of the fleet under the temporary restraining order, for a term of five years on substantially a bare boat basis at the rate of 1/15 of 1 per cent. a day on the cost of the towboats, assumed to be $400,000 each, and 1/10 of 1 per cent. per day on the cost of the barges, assumed to be $110,000 each (R. 67). It is conceded that this offer was made in good faith and that the Standard Oil Company was at all times financially able to carry out its obligations under such a lease, had it been made (R. 67). Goltra could not accept the offer because, as a result of the litigation and the acts of the Secretary of War, he was unable to assure the Standard Oil Company of possession of the fleet for the term of the proposed lease (R. 67).

The United States also concedes that at the time of the seizure and within reasonable time thereafter, it would have been impossible to obtain a fleet similar to the Goltra fleet in the open market and that it would have required at least two years from the date of letting the contract to construct such a fleet (R. 67).

As to the rental or productive value of the fleet, in addition to the Standard Oil offer just described, there was evidence introduced by both the plaintiffs and the United States as to the reasonable market rental value of the fleet on the Mississippi River and its tributaries (R. 68-73). Plaintiffs' evidence, including the testimony of five experts and a contemporary writing by Colonel Gotwals of the United States Corps of Engineers, indicated that the reasonable rental value of the fleet on substantially a bare boat basis was 1/15 of 1 per cent. per day of the cost

of each towboat, and 1/10 of 1 per cent. per day of the cost of each barge, less the expense of annual heavy overhaul and repair amounting, on an average, to about $2,000 per year for each towboat and $500 per year for each barge (R. 69-72). That was the rental value found by the Commissioner (R. 59-60). This evidence indicates that the net market rental value of the fleet amounted to a sum slightly in excess of $1,000,000 a year.[1] The expert called by the United States tended to support plaintiffs' basic figures, although he believed that the long term commercial rental rate should be somewhat less (R. 72).

The United States asked for a finding fixing the rental value of the fleet at a sum approximately one-third as high as the sum fixed by plaintiffs' experts (R. 69). To support this figure, the United States relied entirely on the testimony of an assistant in the cost accounting section of the Chief of Engineers' office (R. 72). This witness had no experience with the actual rental of equipment and was not acquainted with actual rates (R. 72).

Plaintiffs and the United States both requested findings as to the normal, remaining useful life of the fleet at the time of the seizure (R. 61; 73), plaintiffs requesting a finding of thirty years and the United States twenty years (R. 73). The Court of Claims made no finding upon this matter.

Plaintiffs also requested a finding as to the interest rate upon which money could have been borrowed in order to finance the reconstruction of a fleet similar to the one seized (R. 61, 74). Plaintiffs' evidence tended to establish that such interest rate during the time material would have

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[1]For calculation of this amount see Appendix B, *infra*, pp. xiii-xiv.

been no less than 6.138 per cent. annually (R. 74), as compared with the 4 per cent. interest payable by Goltra under his contract with the Government (R. 19). The United States asked for an alternative finding dealing with interest rates generally (R. 74). The court below failed to make any finding upon this question.

The court also refused (R. 61) to make findings of fact, most of which the United States concedes to be true, relative to the second cause of action, such as the cost of the unloading facilities, the rental value of these facilities (R. 67-68) and the value of the land furnished by Goltra for the unloading facilities (R. 61, 74).

ARGUMENT

FIRST: THE COURT OF CLAIMS ERRED IN FAILING TO CONSIDER AS PART OF JUST COMPENSATION CERTAIN ELEMENTS OF VALUE INCLUDING PARTICULARLY THE RENTAL OR PRODUCTIVE VALUE OF THE FLEET.

Addressing itself to the seizure of Goltra's fleet "for the use and benefit of the United States", the special jurisdictional act directs the Court of Claims to "render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not . . . by the United States . . . for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith" (Finding 2, R. 29).

The Court of Claims recognized the necessity of awarding recovery, as directed by this Act, for just compensation.

That court failed, however, to consider, as part of just compensation, elements of recovery which, under the decisions of this court, should have entered into the ultimate award made.

One of the most important elements in determining the amount of compensation recoverable by reason of the seizure, is the rental or productive value of the fleet. The Commissioner of the Court of Claims found the rental value of the fleet in accordance with plaintiffs' request (R. 59-60). Both the plaintiffs and the United States requested the court to make a finding as to rental value (R. 68-69), but the court refused to make any finding whatever on this subject. In its opinion, the court clearly indicated that it did not take into account in awarding just compensation the market rental value of the fleet, for the court said (R. 54):

> "It is contended by the plaintiff that, in arriving at just compensation . . . the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained."

This language obviously referred to plaintiffs' contention that market rental value should be considered. The court's theory that rental value was not an element of just compensation is also illustrated by other language following the passages just quoted (see R. 54).

The court below refused to make a finding that a fleet similar to the Goltra fleet could not have been obtained in the open market at the time of the seizure and that it would have taken two years from the date of letting contracts to reproduce such a fleet (R. 60-61). Such a finding was

made by the Commissioner and the truth thereof is unchallenged (R. 60-61; R. 66, 67).

The Court of Claims also refused to make findings as to the original cost and the value of the fleet at the time of the seizure, although the Commissioner had made a finding which is not challenged by either party (R. 59, 66). The court likewise failed to make a finding as to the remaining useful life of the fleet, although a finding on this question was made by the Commissioner and requested by both parties (R. 61, R. 73).

With the seizure of the fleet, Goltra's rights and privileges under the contracts with the United States were also seized or terminated. Under the provisions of the contracts, the net rental realized from the fleet and unloading facilities was to have been credited on the purchase price of the fleet and unloading apparatus (R. 17-19). The balance of the purchase price was payable in fifteen equal annual installments, with interest at the rate of 4 per cent (R. 18-19). This provision permitted Goltra to purchase the fleet under a very favorable financial arrangement. One of the elements of this arrangement was the low interest rate. The Commissioner found that Goltra could not at the time of the seizure of the fleet or within a reasonable time thereafter have borrowed money upon such favorable terms, and that the interest rate for any loan which could have been negotiated would have been at least 2.138 per cent. greater (R. 61). The Court of Claims, although requested by plaintiffs to make such a finding and requested by the United States to make a finding as to interest (R. 74), failed to make any finding on this question.

The necessity of considering these elements to arrive at a proper award is manifest. The cases are in accord

that all elements must be considered in arriving at just compensation.

The most elaborate consideration of this question in recent years is found in *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106. There this Court considered the elements which should properly constitute just compensation for the requisitioning of ship contracts under the Emergency Shipping Act of June 15, 1917. The claimant in that case had a contract with the New York Shipbuilding Corporation to construct a ship. Approximately half of the contract price had been paid when the United States, acting through the Emergency Fleet Corporation, requisitioned all ships under construction in the builder's shipyard and the materials on hand for the completion of the hulls. At the time of such requisition, the claimant's ship was about 19 per cent. completed. The Court held that the requisitioning of the hull was also a taking of the claimant's contract. This holding is similar to the plaintiffs' contention here that the seizure of the fleet resulted likewise in the taking of Goltra's contract rights.

In the *Brooks-Scanlon* case, the Court then considered in detail the question of how just compensation should be determined. Clearly, the claimant was not entitled to the value of a completed ship, for claimant's ship was not completed and claimant had not paid more than half the purchase price. This Court defined the amounts recoverable as follows (pp. 123, 125-126):

> "By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the instalments remaining to be paid under the contract. It is settled by the decisions of

this Court that just compensation is the value of the property taken at the time of the taking."

* * *

"Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimant lost by the taking [Citations], that is, the sum which will put it in as good a position pecuniarily as it would have been in if its property had not been taken."

The decisions in this Court are uniform that where the measure of recovery is just compensation the full and perfect equivalent of the property taken must be awarded. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *United States* v. *New River Collieries,* 262 U. S. 341, 343, 345; *Russian Fleet* v. *United States,* 282 U. S. 481, 489; *Olson* v. *United States,* 292 U. S. 246, 255.

To determine such perfect compensation for the property and property rights which Goltra lost by reason of the seizure there must, within the rules laid down by this Court, be included a consideration of the productive or rental value

of the fleet and the very favorable terms of financing afforded by Goltra's contract with the United States. This proposition finds full support in *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312. There Congress, by special statute, authorized the condemnation of claimant's lock and dam as part of the improvement of navigation in the Monongahela River. Claimant had a franchise from the State of Pennsylvania to collect tolls for the use of the locks. The condemnation statute expressly directed the court (p. 313) "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated . . .". This Court, however, held that compensation must be made for the franchise as well as the lock and dam, because the Fifth Amendment was applicable to the situation and Congress could not limit the recovery payable under the terms of that Amendment. In commenting upon the words "just compensation" in the Amendment, the Court said (p. 326):

> "There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken."

This Court, in holding that the taking of the physical property composed of the lock and dam also constituted a taking of the plaintiff's franchise, said (p. 343):

> "But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is

taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment, not merely of the value of the tangible property itself, but also of that of the franchise of which he is deprived."

As to the determination of just compensation, this Court said (pp. 328, 329):

"How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner. Various elements enter into this matter of value. * * * * Demand for the use is another factor. The commerce on the Monongahela River, as appears from the testimony offered, is great; the demand for the use of this lock and dam constant. A precisely similar property, in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. For each separate use of one's property by others, the owner is entitled to a reasonable compensation; and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its value. So that if this property, belonging to the Monongahela Company, is rightfully where it is, the company may justly demand from every one making use of it a compensation; and to take that property from it deprives it of the aggregate amount of such compensation which otherwise it would continue to receive."

* * *

> "So, before this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the productiveness of the property, the franchise to take tolls."

In both the *Brooks-Scanlon* and *Monongahela Navigation Company* cases, this Court held that the taking of certain tangible property operated as well to deprive the claimants of contract rights. In both cases this Court held that just compensation must be made equally for the taking of the tangible property and for the taking of the contract rights. In the *Brooks-Scanlon* case this Court indicated that the same rules of valuation must be applied to "contract rights and other intangibles" as to "physical things" (265 U. S., at p. 123).

In the *Monongahela Navigation* case it was also definitely decided that in calculating just compensation "productiveness of the property" must be given substantial weight (p. 329). In that case the productiveness of the property was measured largely by the right to take tolls under the claimant's contract with the State.

In the present case, the productive value of the property depends largely upon the use value of the fleet. It has been decided under a variety of circumstances that where the court is called upon to evaluate the use value of vessels, it will do so upon the basis of the rental value thereof, often expressed in terms of charter hire or demurrage. *Williamson et al.* v. *Barrett et al.*, 13 How. 101, 111, 112; *The Lagonda* (E.D.N.Y.), 44 Fed. 367, 369; *The Ames & Carroll No 20*, 2 Cir., 66 F. (2d) 413, 415; *J. P. Maclay, et al.* v. *United States*, 43 C. Cls. 90; *Jackson* v. *Innes*, 231 Mass. 558, 560-561; *The Missouri River Packet Co.* v.

Hannibal & St. Joseph R. R. Co., 79 Mo. 478, 493-494; 39 Harvard L. R. 760; 27 Columbia L.R. 98. Indeed, the Court of Claims in *Gulf Refining Co.* v. *United States*, 58 C.Cls. 559, 577, and *Hudson Navigation Co.* v. *United States*, 57 C.Cls. 411, 415, 416-417, has heretofore recognized that the market rental value or charter hire of ships is a decisive factor to be considered in awarding just compensation.

The peculiar facts of the present case especially require the consideration of the productive or rental value of the fleet in fixing just compensation. Goltra held the fleet at the time of the seizure under a lease. Under this lease he was entitled not only to the right to possess and use the fleet, but this possession and use in turn were to afford him the means for purchasing the fleet and acquiring complete title thereto.

The contract contemplated payment for the fleet out of its earnings and contemplated that the option to purchase would, in the nature of things, be exercised, for there is no provision as to the use to which the rental accumulated under the lease is to be applied except to the purchase price of the fleet (R. 18-19). It was contemplated that Goltra was to have the use of the fleet for the purpose of realizing a net return thereon to be applied to the purchase price of the fleet. Indeed, Goltra twice exercised his option to purchase, but the United States refused either before or after the seizure to perform its obligations in that regard (Finding 10, R. 32; Finding 42, R. 44).

The seizure of the fleet by the United States, therefore, took from Goltra not only the right to possess and use the fleet for the term of the lease, but the right to possess the fleet during its life and to pay the purchase price for the

fleet out of the revenue produced by the fleet. It is thus apparent that one of the principal things taken from Goltra was the productive value of the fleet—in other words, its rental value for the life of the fleet. But this primary item of value the Court of Claims refused entirely to consider.

How serious an error was committed by the Court of Claims is apparent from even a brief consideration of the rental value figures. As the Court of Claims made no finding whatever on rental value, we shall assume, for the purpose of discussing the figures involved, that the findings made by the Commissioner which are supported by the overwhelming weight of evidence (R. 59-60; R. 68-73) would have been made.

The annual net market rental value of the fleet was $1,110,350, or $4,779,067.55 for the unexpired period of the lease.[1] There would thus, under the terms of Goltra's contract, have been deposited within less than four years an amount greater than the purchase price and accrued interest. At the end of five years from the date of the delivery of the fleet, Goltra would have been the owner of the fleet, having at that time a depreciated value of $3,231,000 and a remaining useful life of from 16 to 26 years. The use value of the fleet to Goltra during the period of the lease alone exceeded the cost of the fleet by $747,909.55.[2]

The productive value of the fleet may also be considered in another light in determining the amount of just compensation which should here be awarded. The United

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[1]The calculation appears as the first calculation in Appendix B, *infra*, pp. xiii-xiv.

[2]The precise calculation appears as the second calculation in Appendix B, *infra*, pp. xiii-xiv.

States does not challenge the fact that this fleet was unique, that it could not have been replaced in the open market, and that from the time of the seizure it would have taken somewhat in excess of two years to build another fleet like it (R. 66, 67). Goltra therefore could under no circumstances have replaced the fleet and acquired its potential productivity in less than that time. The rental value of the fleet during this period of time would have been $2,220,700.[1] Furthermore, in order to finance the construction of a new fleet, Goltra would have had to pay interest at least 2.138 per cent. in excess of the 4 per cent. interest rate stipulated in the contract (cf. R. 18 and R. 74).

The value of possession of the fleet under the contract of which Goltra was deprived by the seizure was therefore the cost or reproduction value of the fleet, viz., $3,590,000 (R. 66-67), together with the sum of $2,834,733.59[1] representing the rental value of the fleet during the period of construction and the interest differential—a total of $6,424,733.59. From this total there must, of course, be subtracted the sum of $3,590,000, which Goltra had to pay in any event, either to the United States or for the construction of a new fleet. On this basis the net use value of the fleet, at the time of the seizure, would have amounted to $2,834,733.59.

It is also interesting to reconstruct the operation of Goltra's contract with the United States in its entirety. We shall assume, in other words, that the United States had properly performed its duties under the option provision of the contract, that Goltra had thus acquired the right to permanent possession of the fleet, and that he paid

[1] This sum is calculated in Appendix C, *infra*, pp. xv-xvi.

therefor in fifteen stipulated equal annual installments. We assume, also, that the market rental value of the fleet was received by Goltra. On this basis, at the end of the fifteen year period, the total net return after payments to the United States, together with the depreciated value of the fleet, would have amounted to $13,711,456.05.[1]

We have made these calculations to show that a failure to consider the rental or productive value of the fleet in its relation to Goltra's contract rights constitutes a very serious omission. We do not suggest that any of these calculations constitutes the exact measure of just compensation, but when it is remembered that the court awarded, over and above out of pocket expenditures, a sum of only $170,000 to compensate Goltra for the seizure of the fleet and the consequent loss of his contract rights, it is obvious that a very different result would have been achieved had the productivity of the fleet, measured by its rental value, been taken into consideration. It may not be amiss to point out that Colonel Ashburn, who seized the fleet, advised the plaintiff during the course of the injunction litigation that a reasonable rental for the fleet was "being set aside and held, to be paid, if the Supreme Court decides that your lease is non-recoverable by the Secretary of War" (R. 75). That decision has now been made by the Court of Claims and is unchallenged.

In measuring the productivity of the fleet, we have shown in the calculations made that it is essential also to take into account the original cost of the fleet, which was approximately its value at the time of the seizure (See R.

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[1]The calculations upon which this figure is based appear as Appendix D, *infra*, pp. xvii-xviii.

66-67). The Court of Claims should be required to make the undisputed finding as to this sum. Also, in considering the productivity of the fleet and the value of Goltra's contract rights, we have shown that it is necessary to consider the life expectancy of the fleet, in other words, its rate of depreciation and the differential in interest rates under the contract and in the open money market. Accordingly, the Court of Claims should also be required to make the findings requested on these subjects (See R. 61, 73, 74). And the Court of Claims should be required to consider these matters in awarding just compensation.

The argument which we have made relative to recovery under the first cause of action applies equally to the second cause of action. The seizure of the fleet and the purported cancellation of both the original and supplemental contracts (Finding 23, R. 39) deprived Goltra of the use of the unloading facilities in the same manner in which he was deprived of the use of the fleet. In addition, Goltra was deprived of the use of land and the concrete runways which he had furnished for use in connection with the unloading facilities (Findings 50-53, R. 45-47). The Court of Claims made a finding and stated in its opinion that it considered the rental value of Goltra's land and expenditures made by him in connection with the supplemental contract. The Court, however, refused to find and did not consider the rental value of the unloading equipment (R. 61). This rental value is conceded in the stipulation entered into for the purpose of this appeal, to have been $25,000 a year (R. 66, 67). Nor did the Court consider wages which Goltra was required to pay to watchmen to watch the unloading facilities for the benefit of the United States (R. 66, 68).

Without further argument, it is our contention that the same principles of just compensation heretofore discussed should be applied to the second cause of action. The figures indicating the use value of the facilities and the wages for watchmen which constituted a necessary expenditure are set forth in Appendices E and F, *infra,* pages xix-xxii.

SECOND: THE OFFER OF STANDARD OIL COMPANY OF LOUISIANA TO RENT THE GOLTRA FLEET FOR A TERM OF FIVE YEARS WAS ADMITTED IN EVIDENCE WITHOUT OBJECTION, IS CONCEDED TO BE TRUE AND SHOULD HAVE BEEN CONSIDERED BY THE COURT OF CLAIMS IN DETERMINING THE PRODUCTIVE VALUE OF THE FLEET.

The very substantial market rental value of the Goltra fleet as testified to by plaintiffs' experts was fully substantiated by an actual offer to rent the Goltra fleet for a period of five years upon the very terms specified in the expert testimony (*cf.* R. 66, 67 and R. 68-72). The United States concedes that this offer was in fact made in good faith by an offeror amply able to perform the obligations of such a charter party (R. 66, 67). It is thus conceded that in May, 1925, Standard Oil Company of Louisiana desired to acquire the use of barges and towboats for the transportation of oil on the Mississippi River, and for that purpose offered to lease the Goltra fleet on substantially a bare boat basis, the lessee to pay all operating expenses, insurance, maintenance, repairs "and all other costs of operation" and to pay as rental to Goltra 1/15 of 1 per cent. per day on the cost of the towboats, which was then assumed to be

$400,000 each, and 1/10 of 1 per cent. per day on the cost of the barges, assumed to be $110,000 each (R. 66, 67). The lease was to run for five years, with an option to Standard Oil Company of Louisiana to renew for a like period (R. 66, 67). It is further conceded that Goltra was willing and desired to accept the offer, but that by reason of the seizure by the United States and the resulting injunction litigation, he was unable to assure Standard Oil Company of possession of the fleet for the term of the lease (R. 66, 67).

The testimony to establish this offer was given by those who made the offer, the then Marine Superintendent and Vice President respectively of Standard Oil Company of Louisiana, and by Goltra and one of his employees (R. 58). When this testimony was introduced, the United States made no objection to its introduction in evidence (R. 68). The United States now so stipulates (R. 68).

None the less, the Court of Claims refused to make a finding as to this offer and summarily rejected it on the authority of *Sharp* v. *United States,* 191 U. S. 341, 348, 349; *Clarke* v. *Hot Springs Electric Light & Power Co.,* 10 Cir., 55 F. (2d) 612 and *Sommers* v. *Commissioner of Internal Revenue,* 10 Cir., 63 F. (2d) 551 (R. 54).

The decision in the *Sharp* case does not compel the rejection of the evidence here. The evidence there rejected was the testimony of a claimant in a condemnation proceeding to the effect that a certain offer for his property had been made to him. The evidence was held inadmissible, principally because it was hearsay and would accordingly permit no cross-examination of the offeror on facts relevant to establish the good faith of the offeror, the reason for his desire of purchase, his ability and actual desire to

pay the amount offered. Furthermore, the opinion of this Court was addressed to offers relating to real estate and not to chattels.

This Court recognized in the *Sharp* case that the policy which led to the rejection of the testimony in that case was not all-inclusive. The Court indicated that an offer properly proved might be admissible and of probative value if it was

> "... an honest offer, made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer ...". (p. 349).

In the present case, each of the objections raised in the *Sharp* case has been met. The offer was proved by testimony of the offeror, as well as the offeree (R. 68). The officials of Standard Oil Company of Louisiana testified in the case and were subjected to cross-examination (R. 68). The United States on this appeal concedes that the offer was made, that it was made in good faith, that it was made by an offeror able financially to carry out the offer, and that the fleet for which the offer was made was desired by Standard Oil Company of Louisiana to carry on a certain phase of its established business (R. 66-67). Furthermore, E. F. Wieck, the Marine Superintendent of Standard Oil Company, who was one of the witnesses to the offer, was an expert in river transportation and certainly an individual capable of forming a fair and intelligent judgment as to the rental value of the fleet (R. 67, 68, 70-71).

It is accordingly undisputed that the offer was an honest one, made fairly and intelligently by officers of a com-

pany "really desirous of purchasing [leasing], entirely able to do so, and to give the amount of money mentioned in the offer" (191 U. S., at p. 349). Assuming the applicability of the *Sharp* case, therefore, to offers involving chattels and applying the rule there stated, the offer in the present case was admissible.

The decisions in *Sommers* v. *Commissioner of Internal Revenue,* 10 Cir., 63 F. (2d) 551, and *Clarke* v. *Hot Springs Electric Light & Power Co.,* 10 Cir., 55 F. (2d) 612, add nothing to the law on this subject. Both cases without discussion reject hearsay evidence of offers on the basis of the *Sharp* decision. The rejection of the evidence in the *Sommers* case was apparently only on the ground that the offer was remote in point of time.

On the other hand, the lower federal courts, both before and after the decision in the *Sharp* case, have repeatedly admitted in evidence proof of offers on the question of the value of personal property. *Republican Newspaper Co.* v. *Northwestern Associated Press,* 8 Cir., 51 Fed. 377 (value of a newspaper franchise); *Heiner* v. *Crosby,* 3 Cir., 24 F. (2d) 191, 193 (value of stock); *Buena Vista Land & Development Co.* v. *Lucas,* 9 Cir., 41 F. (2d) 131, 132-133 (value of a chose in action); *The Waalhaven,* (S.D.N.Y.) 1 F. Supp. 396, 397, aff'd 64 F. (2d) 25, cert. denied, 289 U. S. 752 (value of potash); *Manufacturers Paper Co.* v. *Commissioner of Int. Rev.,* 2 Cir., 89 F. (2d) 684 (value of stock).

Apposite to the present facts is the opinion of the Circuit Court of Appeals for the Second Circuit in *Manufacturers Paper Co.* v. *Commissioner of Int. Rev.,* 89 F. (2d) 684 (*supra*). In distinguishing the *Sharp* case, the court said (p. 686):

> "The bona fides of the offer, the financial responsibility of the offeror, and his qualifications to know the value of the property were proved without dispute by his own testimony and that of a banker ready to supply the money. Hence the criticisms leveled against the evidence of offers in general, as in Sharp v. United States, 191 U. S. 341, 349, 24 S. Ct. 114, 48 L. Ed. 211, were satisfactorily met."

Other courts have also held offers admissible as evidence on the issue of chattel values. *German-Am. etc. Bank* v. *Spokane etc. Nav. Co.*, 49 Wash. 359, 360-361; *Rottlesberger* v. *Hanley*, 155 Iowa 638, 647; *Georgia, Florida & Alabama Railway Co.* v. *Spivey*, 14 Ga. App. 157; *The Cygnus*, Roscoe, *Damages in Marine Collisions*, 3rd ed. pp. 154, 157, not officially reported. See also *Gatling* v. *Newell*, 9 Ind. 572, 583[1].

In view of contentions heretofore made by the United States relative to the offer, we may point out that in many of the cases in which an offer was admitted in evidence, it was done particularly because the property was "of the peculiar kind" and therefore did "not possess what is commonly called a market value." *Republican Newspaper Co.* v. *Northwestern Associated Press*, 51 Fed. 377, 378-379 (*supra*). *Manufacturers Paper Co.* v. *Commissioner of Int. Rev.*, 89 F. (2d) 684, 686, (*supra*); *Buena Vista Land & Development Co.* v. *Lucas*, 41 F. (2d) 131, (*supra*). See also *Heiner* v. *Crosby*, 24 F. (2d) 191, 193, (*supra*).

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[1]There is a tendency, even in real estate cases to admit evidence of offers made in good faith and proved beyond question. *North American Telegraph Co.* v. *Northern Pac. Ry. Co.*, 8 Cir., 254 Fed. 417, 418, 419; *Faust* v. *Hosford*, 119 Iowa 97, 104; *City of Chicago* v. *Lehmann*, 262 Ill. 468, 474.

Thus, if there were anything to the contention of the United States that by reason of the unique nature of the boats and barges here involved there was no actual market value, then the admissibility of the Standard Oil offer is emphasized. That offer is the best evidence of "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy" (*Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 124, *supra; Olson* v. *United States,* 292 U. S. 246, 257, *supra*).

In addition to all this, the objection made to the offer came too late. When the offer was proved by four different witnesses, the United States made no objection to the introduction of this testimony in evidence (R. 68). Whatever may be said as to the original competency of the evidence relative to this offer, it is clear that once admitted, the evidence is relevant and material. The offer was not made, as the Court of Claims intimates, at a remote time. The fleet was seized in March, 1923 (Finding 28, R. 41). It was returned to Goltra under the temporary restraining order in September, 1924 (Finding 39, R. 44) and the offer was made in May, 1925 (R. 67). On the latter date, Goltra was in possession of the fleet, and that date was within the five-year lease period of the original contract. In the light of the undisputed expert testimony that the rental value of the fleet remained the same from the date of the seizure until the time of the testimony in 1936 and 1937 (R. 70-72), it is clear that there is nothing remote, in point of time, about this offer.

Accordingly, the general rule must be applied to this evidence, viz., that evidence, even though it may have been originally incompetent, must be considered in so far as it

is relevant and material if no objection was made at the time when the evidence was introduced. *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, 9; *Diaz* v. *United States*, 223 U. S. 442, 450; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 130; *Rowland* v. *St. Louis & S. F. R. R. Co.*, 244 U. S. 106, 108; *Dowling* v. *Jones*, 2 Cir., 67 F. (2d) 537, 539. Apposite here is the statement of this Court in the *Diaz* case (p. 450):

> "So, of the fact that it was hearsay, it suffices to observe that when evidence of that character is admitted without objection it is to be considered and given its natural probative effect as if it were in law admissible."

This rule has heretofore been recognized by the Court of Claims. *McIntyre* v. *United States*, 52 C. Cls. 503, 508-509; *Camden Iron Works* v. *The United States*, 47 C. Cls. 124, 128; *Lynch* v. *United States*, 6 C. Cls. 246, 250. Nor is there anything in the procedure of the Court of Claims involving the taking of evidence before a Commissioner which excuses the failure to object to evidence at the time of its introduction. Rule 44 of the Rules of that court clearly shows that objection must be made and exception must be taken if evidence is deemed to be inadmissible.[1]

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[1] "PROCEDURE BEFORE COMMISSIONERS OF THE COURT.

44. The commissioner shall rule upon the materiality, relevancy, or admissibility of any evidence offered and the form of any question asked. If objection is made to the form of the question and said objection is sustained by the commissioner, the question shall be reframed to comply with the ruling of the commissioner thereon. If objection is made

THIRD: THE COURT OF CLAIMS PROPERLY AWARDED A SUM MEASURED BY INTEREST AS PART OF JUST COMPENSATION.

A. The award of a sum measured by interest as part of just compensation is required by the Fifth Amendment and directed by the special jurisdictional act.

The Court of Claims has found that Colonel Ashburn, pursuant to orders of the Acting Secretary of War, seized Goltra's fleet without the consent of Goltra or his employees "for the use and benefit of the United States" (Findings 27, 28, R. 41; Opinion, R. 52). The Court also found that the United States has retained possession of the fleet and caused it to be operated as part of its own barge line (Finding 40, R. 44).

These findings, to none of which the United States has excepted or assigned error, establish the taking of private property for public use. Just compensation under the Fifth Amendment is therefore payable to plaintiffs. Congress,

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to the evidence sought to be elicited by the question the commissioner shall rule thereon, and in the event the ruling is adverse to the party offering the evidence said party may except thereto and make an offer to prove, which offer shall consist of a succinct statement of the evidence sought to be elicited by the question. When documentary evidence is offered and objection is made thereto, the commissioner shall rule upon the same, and if the ruling is adverse to the party offering said evidence an exception may be taken to the same and the document or documents offered shall be marked by the reporter for identification, and by him filed with the transcript of the testimony and evidence in the case. Any exception taken by either party to the commissioner's ruling shall be noted at the time it is taken. The exceptions so taken will be considered by the court at the hearing on the report of the commissioner. Objections to questions or answers shall be explicitly but briefly stated."

in enacting the special jurisdictional act, recognized this and directed payment accordingly by requiring the court to render judgment for just compensation (R. 29).

That a sum measured by interest upon the value of the property taken, from the date of taking to the time of payment, is a part of just compensation under these circumstances, has been uniformly recognized since the decision by this Court in *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299. Property had there been taken by the United States under the wartime Lever Act (40 Stat., c. 53, p. 276). That act authorized the payment of just compensation for property so taken. This Court held that a sum, measured by interest, was a part of just compensation guaranteed by the Constitution, and that such a sum, measured by interest, must be included in the award to the claimant in a suit under the Lever Act. The Court said (p. 306): "The Constitution safeguards the right and § 10 of the Lever Act directs payment." This Court thus decided that the use of the words "just compensation" in an Act of Congress directed the payment of the just compensation guaranteed by the Fifth Amendment.

As the logical consequence of this decision, a sum measured by interest, not as interest but as part of just compensation, has been allowed by this Court in every case where the Government took private property or cancelled private rights under Congressional Acts specifying the measure of recovery to be just compensation. This has been true equally in cases which approximated the strict exercise of the power of eminent domain and other cases involving a somewhat different basis of action. A sum measured by interest has been made a part of awards for just compensation prescribed in Acts of Congress for land taken under

such acts, *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *United States* v. *Benedict,* 261 U. S. 294; for leases taken under such Acts, *Phelps* v. *United States,* 274 U. S. 341; see also *A. W. Duckett & Co., Inc.* v. *United States,* 274 U. S. 765, reversing 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700; for products and supplies ordered under such Acts, *Liggett & Myers* v. *United States,* 274 U. S. 215; for the taking of contract rights under such Acts, *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; and for the cancellation or suspension of contracts under such Acts, *DeLaval Steam Turbine Co.* v. *United States,* 70 C. Cls. 51, aff'd 284 U. S. 61; *Barrett Co.* v. *United States,* 273 U. S. 227, judgment for interest entered 66 C. Cls. 293. This Court has more recently reviewed the principles established by the foregoing decisions in *Jacobs* v. *United States,* 290 U. S. 13.

The Court of Claims likewise, in an unbroken series of decisions, has held a sum measured by interest to be a part of the recovery where Congress has stated that just compensation should be the measure of recovery.[1]

When Congress passed the special jurisdictional act herein it knew the meaning of the phrase "just compensa-

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[1] *Benjamin C. Grymes* v. *United States,* 58 C. Cls. 398; *Minnie Moore, Administratrix* v. *United States,* 60 C. Cls. 326; *Yorkview Finance Corp.* v. *United States,* 60 C. Cls. 646; *F. C. Mattern & F. L. Carre, Execs.* v. *United States,* 66 C. Cls. 559; *Atlantic Refining Co.* v. *United States,* 59 C. Cls. 108; *Consorzio Veneziano* v. *United States,* 64 C. Cls. 11; *Ocean S. S. Co. of Savannah* v. *United States,* 64 C. Cls. 98, certiorari denied 277 U. S. 584; *John Russell Smith* v. *United States,* 67 C. Cls. 182; *Grays Harbor Motorship Corp.* v. *United States,* 71 C. Cls. 167; *Nitro Powder Co.* v. *United States,* 71 C. Cls. 369, 374; *Wheeling Steel Corp.* v. *United States,* 71 C. Cls. 571; *Virginia Engineering Co., Inc.* v. *United States,* 89 C. Cls. 457.

tion" as it had been interpreted in innumerable decisions by this Court and by the Court of Claims. Indeed, Congress had appropriated millions of dollars to pay awards including sums measured by interest under provisions of statutes which require the award of just compensation. In these circumstances the presumption arises that Congress used the words "just compensation" advisedly and in the full legal significance given them by repeated judicial interpretation. *McCool* v. *Smith,* 1 Black 459, 469; *Case of the Sewing Machine Companies,* 18 Wall. 553, 584; *The "Abbotsford",* 98 U. S. 440, 444; *United States* v. *Mooney,* 116 U. S. 104, 106; *Kepner* v. *United States,* 195 U. S. 100, 124; *United States* v. *Merriam,* 263 U. S. 179, 187; *Hecht* v. *Malley,* 265 U. S. 144, 153; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

The intention of Congress to authorize recovery here, on the basis of the then known decisions defining just compensation, is emphasized by the fact that the special jurisdictional act authorized the award of just compensation "for certain vessels and unloading apparatus taken . . . for the use and benefit of the United States" (R. 29). Such language unmistakably stamps this case as one to which Congress wished the constitutional principles of just compensation to be applied. The unchallenged finding of the Court of Claims that the seizure of the fleet was in fact "for the use and benefit of the United States" (Finding 28, R. 41) compels the application of these well settled principles and requires the inclusion in the judgment of a sum measured by interest.

To avoid this conclusion, the United States urges that the taking here was tortious and that, therefore, a different rule should be invoked. This contention lacks merit. The

argument of the United States is wholly without foundation in the authorities which it cites.

A good part of the Government's argument relates to the uncontroverted proposition th .t in the absence of specific legislation a claimant whose property was taken by unauthorized acts of Government officers may not sue the United States. The Government, in attempting to apply this juridical result to the present case, misconceives entirely the basis of the decisions. The cases do not hold, as the United States argues, that a claimant, whose property has been seized and used without proper authorization by a United States officer for the Government's benefit, is without a legal or constitutional right. On the contrary, the cases hold that the claimant has a right but that he lacks a remedy against the United States by reason of the explicit provisions of the Court of Claims Act (Judicial Code § 145, 28 U. S. C. A. § 250) and the Tucker Act (Judicial Code § 24, 28 U. S. C. A. § 41(20). In such cases the United States, in the absence of specific legislation stands on its sovereign prerogative and does not consent to be sued. But "The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it."[1]

The basis of the decisions upon which the Government relies is well illustrated in *Hooe* v. *United States,* 218 U. S. 322. There Acts of Congress authorized the expenditure of certain sums to pay the rental for quarters occupied by the

[1]From the opinion of this Court delivered by Mr. Justice Holmes in *United States* v. *The Thekla* 266 U. S. 328, 340, where interest was allowed as part of .e recovery against the United States in an admiralty case in which the United States had voluntarily submitted itself to the jurisdiction of the courts.

Civil Service Commissions. The plaintiff landlord claimed additional sums by reason of the use and occupancy of quarters by the Commission and brought suit in the Court of Claims under the Tucker Act. Some basis for plaintiff's claim was afforded by the acts of certain Government agents, including the Secretary of the Interior. This Court, however, held that the Congressional authorization limited the expenditures to the amounts stated in the acts and that any action by Government officers tending to impose liability on the Government in excess of such amounts so authorized gave rise to no cause of action against the United States. Judgment below dismissing the petition for lack of jurisdiction was affirmed. This Court said (pp. 333-334):

> "It is equally clear that the Secretary could not, by his acts, create a state of things from which, in the absence of legislation on the subject, an implied contract could arise under which the Government would be liable, by reason of its *constitutional* duty, to make just compensation for the use of private property taken for public purposes. In such a case the remedy is with Congress, and not with the courts. * * * If the circumstances justify such a course, Congress in its discretion can intervene and do justice to the owner of private property used by officers of the Government in good faith for public purposes, although without direct legislative authority. The plaintiffs' remedy is in that direction."

Similar language is found in *Gibbons* v. *United States,* 8 Wall. 269, 275-276, and *Filor* v. *United States,* 9 Wall. 45, 49.

The decisions in these cases relied upon by the United States are not that the claimants whose property has been taken should be defeated on the merits, but that the courts

under the general statutes in effect at the time of the respective decisions had no jurisdiction over the claims. This is pointedly illustrated in the decisions in *Hill* v. *United States,* 149 U. S. 593, 599, and *Tempel* v. *United States,* 248 U. S. 121, 130-131 where this Court reversed the decisions below giving judgment in favor of the United States and held that actions should have been dismissed for want of jurisdiction. In the other principal cases relied on by the United States, this Court affirmed judgments below dismissing complaints for want of jurisdiction. *Langford* v. *United States,* 101 U. S. 341, 344-346; *Hijo* v. *United States,* 194 U. S. 315, 321-322; *Klebe* v. *United States,* 263 U. S. 188 (affirming so much of decision of Court of Claims as dismissed the cause of action sounding in tort, there was no appeal from that part of the judgment in plaintiff's favor on an express contract); *Pearson* v. *United States,* 267 U. S. 423.

As long as the action against the United States is one founded in a tort, the nature of the tort, of course, makes no difference. The rule is the same, whether the tort arises from the act of an officer in excess of his authority or whether the tort lies in the taking by an officer of the United States of property under a claim of right where in fact title is in the plaintiff. Where the United States has seized and used property under a claim of title, it could never be argued that there existed an implied contract on the part of the United States to pay any plaintiff the value of such property. If the claim of the United States were proper, then the plaintiff would have no right. If, on the other hand, the claim of the United States were groundless, then the officer of the United States who had seized the property committed a tort for which Congress has not pro-

vided redress except in specific cases. Accordingly, in the absence of special jurisdictional acts, complaints based on the theory that the claim of the United States was unlawful have been dismissed for want of jurisdiction. *Hill* v. *United States,* 149 U. S. 593, 599; *Tempel* v. *United States,* 248 U. S. 121, 130-131; *Langford* v. *United States,* 101 U. S. 341, 344-346; *Klebe* v. *United States,* 263 U. S. 188. These decisions, however, are not equivalent to determinations that there had been no taking. If Congress had provided a remedy, there is nothing in these decisions to indicate that the measure of compensation would have been different from that enjoined by the Fifth Amendment.

Nor do we find anything in certain other decisions by this Court, characterized by the Government as "divergent," to lead to the conclusion that the cases upon which we have just commented, stand for any proposition other than that the claims there asserted were beyond the jurisdiction of the courts.

United States v. *Lynah,* 188 U. S. 445, *United States* v. *Cress,* 243 U. S. 316 and *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645, were flowage cases. The United States in these cases did not take the property or lands, for which compensation was asked, under a claim of right, but rather contended that, as a matter of law, there had been no taking of any property. In each case, this Court resolved the legal question against the United States and held, accordingly, that there was an authorized taking of plaintiff's property giving rise to an implied contract over which the Court had jurisdiction.

Similarly, in *Hurley* v. *Kincaid,* 285 U. S. 95, 104, injunction to prevent the prospective flowage of plaintiff's land was denied because this Court held that such flowage

would constitute an authorized taking of plaintiff's property and entitle the plaintiff after the taking to recover "just compensation under the Tucker Act in an action at law as upon an implied contract." In *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, this Court denied relief to a plaintiff who claimed that the defendant contractor, while engaged in work for the Government, had caused erosion on plaintiff's property because it was held that the plaintiff had a complete remedy against the United States for "just compensation under the Fifth Amendment" (p. 21).

We call attention in passing to the fact that in each of these cases the Court recognized that the recovery on the implied contract would be just compensation as provided in the Fifth Amendment, and this Court, to set at rest all doubts on this score, stated that such compensation would be "the same as that which he might have been awarded had defendants instituted the condemnation proceedings which it is contended the statute requires" (*Hurley* v. *Kincaid*, 285 U. S. 95, 104).

If these decisions have any bearing on the present question, and the United States seems to believe that they do, it is only to emphasize the fact that plaintiffs' difficulty in cases where the taking of property has been designated as tortious was purely one of jurisdiction.

In the present case there is no jurisdictional question. The special jurisdictional act has conferred jurisdiction. The United States did not in the court below, and does not here question the validity of that act or its efficacy to confer jurisdiction. Heeding the admonition of this Court in the *Hooe* case (218 U. S. 322, *supra*), Goltra sought his remedy in Congress and received express authorization to bring this action. The Government is now called upon to

pay the just compensation guaranteed by the Fifth Amendment of the Constitution.

This situation is not a novel one. Congressional action culminating in special jurisdictional acts has hitherto been held efficacious to permit the claimant to recover the just compensation guaranteed by the Constitution, although the original taking in the absence of a special jurisdictional act did not give rise to a cause of action of which the courts could take jurisdiction.

In *United States* v. *Creek Nation,* 295 U. S. 103, the special jurisdictional act conferred upon the Court of Claims jurisdiction "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe or . . . out of any Act of Congress in relation to Indian affairs" (p. 105). The claim litigated related to land which the United States erroneously treated as part of land ceded by the Creek Nation to the United States. In fact, this land had not been ceded; the United States, however, sold and patented the land in question to settlers. The disposition made by the United States was under a claim that the United States had title to the land in question. None the less, this Court held, under the special jurisdictional act, that the Creek Nation was entitled to recover just compensation, and that such compensation included a sum measured by interest from the date of the taking. The Government now attempts to explain away the force of this case by quoting language from the opinion indicating that the Creek Nation was under the guardianship of the United States. This quotation comes from the part of the opinion dealing with the question of whether the United States actually ap-

propriated and took the lands (295 U. S., at pp. 109-110). It does not relate to the separately numbered division dealing with the amount of compensation. There this Court said (p. 111):

> "But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added."

The decision in the *Creek Nation* case, permitting recovery of just compensation including a sum measured by interest, stands for a general rule and is not limited to any unusual situation. Where relief for tortious acts has been afforded by Congress, and where such acts amount to taking of private property for public use, the ordinary measure of just compensation must be applied. In such a situation the tortious acts have been adopted by the United States, and the usual payment of just compensation must be made.

This general rule has been stated by this Court in *Shoshone Tribe* v. *United States*, 299 U. S. 476. That case was brought under a special jurisdictional act conferring upon the Court of Claims jurisdiction "to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians . . . may have against the United States arising under or growing out of" certain treaties or Acts of Congress (299 U. S., note, pp. 484-485). As in the *Creek Nation* case, no specific provision for interest was made, and just compensation

was not even prescribed as the measure of recovery. The claim of the Shoshone Indians under this special act was for compensation for land wrongfully taken from them by officers of the United States and given to another tribe of Indians. This Court pointed out that both the Commissioner of Indian affairs and Congress "continued to act on the assumption that the occupancy of the Arapahoes, initiated, as we have seen, under a military escort, was permanent and rightful" (p. 489). The United States contended that the original taking had been tortious and that, accordingly, no sum measured by interest should be allowed. This Court, reversing the Court of Claims, held that a sum measured by interest constituted an inherent part of the recovery. Mr. Justice Cardozo, speaking for the Court, said (pp. 496-497):

> "The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.
>
> The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation. *Crozier* v. *Krupp, supra.* The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs* v. *United States,* 290 U. S. 13, 16; *United States* v. *Cress,* 243 U. S. 316, 327-330; *Hurley* v. *Kincaid,* 285 U. S. 95, 104. Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States* v. *Creek Nation, supra,*

> pp. 110, 111. Cf. *Yankton Sioux Tribe* v. *United States,* 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs* v. *United States, supra; Phelps* v. *United States,* 274 U. S. 341; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Seaboard Air Line Co.* v. *United States,* 261 U. S. 299, 306. These cases distinguish *United States* v. *North American Co.,* 253 U. S. 330, cited by the Government which 'rested upon its special facts.'"

There is nothing in this statement of the rule which would limit its application to Indian cases.

The applicable rule has also been clearly recognized by this Court in *Crozier* v. *Krupp,* 224 U. S. 290. Injunction to prevent the use of plaintiff's patents by the United States was denied on the ground that the Act of June 25, 1910 (36 Stat., c. 423, p. 851) furnished an adequate remedy for the infringement of plaintiff's patent by officers of the United States. The Act in question provided that whenever a patented invention "shall hereafter be used by the United States without license of the owner thereof . . . such owner may recover reasonable compensation for such use by suit in the Court of Claims." It was apparently the claimant's contention that this Act might not apply because the United States had commenced the use of the patent prior to the passage of the Act. The Court conceded that prior to the passage of the Act in the absence of facts giving rise to an implied contract, the United States could not have been sued for the use of the patent, but this Court said (p. 305):

> "The adoption by the United States of the wrongful act of an officer is of course an adoption of the

> act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the Government, for which compensation is provided."[1]

Subsequently this Court, in *Waite* v. *United States,* 282 U. S. 508, was specifically called upon to decide whether the statute discussed in the *Crozier* case entitled a claimant to a sum measured by interest. The statute had been somewhat amended and provided (Act of July 1, 1918, 40 Stat., c. 114, p. 705):

> "That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

The statute did not make legal the use of the patent by the United States "without license . . . or lawful right" but simply provided a remedy. Use of the patent in the absence of contract, express or implied, constituted tortious conduct. None the less, this Court held that a sum measured by interest should be allowed as part of the "entire compensation" by analogy to the cases decided under statutes in which Congress had provided for just compensation (*Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106;

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[1]This language has been more recently adopted by the Court in *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 22.

Liggett & Myers v. *United States,* 274 U. S. 215; *Phelps* v. *United States,* 274 U. S. 341).

These decisions are authoritative precedents here. Contrary to the Government's contention now, it is apparent that in each of the cases the ratification of the original tortious act by the United States is to be found in the following conduct: first, in the retention of benefits by the United States, and second, in the passage of a jurisdictional act conferring upon the Court of Claims jurisdiction to hear and determine the plaintiff's case. Nothing more is required. Both of these elements are present here. It is conceded that the original seizure of the Goltra fleet was for the use and benefit of the United States (Finding 28, R. 41) and that the United States has continuously operated the fleet as part of its own barge line (Finding 40, R. 44). The special jurisdictional act which here provides for "just compensation . . . for certain vessels and unloading apparatus taken, whether tortiously or not . . . by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States" (R. 29) constitutes a much more specific ratification and basis for the award of just compensation than the acts in the other cases.

There is no force in the Government's lengthy argument that the special jurisdiction act does not constitute ratification because Congress left to the court the determination of the validity of Goltra's claim. The special jurisdictional acts in the *Creek Nation* (295 U. S. 103) and *Shoshone Tribe* (299 U. S. 476) cases, and the general jurisdictional act in *Crozier* v. *Krupp,* 224 U. S. 290, and *Waite* v. *United States,* 282 U. S. 508, did no more than confer upon the Court of Claims the power to adjudicate the validity of claims.

The impression which the Government seeks to leave that Congress, when it passed the jurisdictional act, had no knowledge of the controversy between Goltra and the United States, is answered by a reference to the committee reports (Appendix A, *infra*, pp. i-xii), which show a full and complete knowledge by Congress of the entire controversy, including the previous judicial decisions which indicated beyond a shadow of a doubt that the United States had claimed that the Goltra fleet had been rightfully seized by it.

In these circumstances the passage of the special jurisdictional act can indicate only specific adoption and ratification by Congress of the seizure of Goltra's fleet. The Government's argument that Congress should be under no duty to reject benefits conferred upon the United States by unauthorized acts of its agents may be perfectly sound, but it has no application here. There is no question of rejection or acquiescence by silence. Congress has taken positive action and has specifically said that if the seizure for the use and benefit of the United States was wrongful, then it would adopt and stand back of the acts of the Government's officers and agents and make just compensation for the taking.

We conclude from the decisions heretofore discussed that ratification of the seizure of Goltra's fleet, for the use and benefit of the United States, is sufficient basis for a valid claim against the United States for the just compensation specified in the Fifth Amendment. This would be true, irrespective of the original nature of the taking and irrespective of whether the Congressional Act specified recovery as just compensation. The direction in the Act of the payment of just compensation, however, makes this case indistinguishable from *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299.

B. The special jurisdictional act alone compels the award of a sum measured by interest as part of just compensation.

While we believe that a sum measured by interest should be awarded here as part of the just compensation required by the Fifth Amendment and directed by the special jurisdictional act, we do not acquiesce in the Government's contention that the words "just compensation" in the special jurisdictional act are not alone sufficient to require an award measured according to the standards of just compensation laid down by this Court.

The argument that the words "just compensation" describe Goltra's claims and not the measure of recovery is unfounded. In the title of the Act, Congress described Goltra's claims as "the Claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus" (R. 29). If Congress had intended merely to describe Goltra's claims by using the phrase "just compensation" in the body of the Act, it is strange that those words were omitted from the description of the claims in the title. Furthermore, Congress has unmistakably shown that it meant judgment to be rendered here for just compensation in the Constitutional sense by describing the subject matter for which just compensation was to be rendered as "certain vessels and unloading apparatus taken . . . by the United States . . . for the use and benefit of the United States" (R. 29). It is hard to conceive of language which could more aptly indicate the intention of Congress that the Court should award to Goltra a recovery measured as recoveries are measured for takings under the power of eminent domain.

The reports of the Congressional committees indicate that Congress was fully aware of the long delay occasioned by the Government's consistent opposition to efforts by Goltra to obtain justice (Appendix A, pp. i-xii, *infra*). It is small wonder, therefore, that Congress described the measure of recovery to be just compensation which Congress knew would include a sum measured by interest.

It is unnecessary to repeat the argument made above (*supra,* pp. 37-38) that Congress passed the special jurisdictional act with full knowledge of a multitude of decisions, both in this Court and in the Court of Claims, holding that a recovery of just compensation must include a sum measured by interest. These decisions were made in the decade immediately preceding the enactment of the special jurisdictional act herein. In answer to this argument, it avails the Government little to point out that in a few early state decisions the phrase "just compensation" may have been loosely used to describe the theory of restitution to be made between private litigants. This Court, in *Hetzel* v. *Baltimore & Ohio Railroad,* 169 U. S. 26, 37, did not use the phrase "just compensation" as equivalent to legal damages, but held merely that on the facts before it recovery should have been allowed on principles having "their foundation in the idea of just compensation for wrongs done" (p. 37). Furthermore, this Court held that proper instructions to the jury should have allowed them to add a sum "as was equal to six per cent interest on such value" (p. 37).

In spite of the Government's learned research, it fails to cite a single case in which this Court has held that a sum measured by interest should not be allowed where Congress has stated that recovery shall be just compensation. We

agree that there is no such case.[1] Conversely, we believe that in every case in which Congress has said that just compensation is the measure of recovery a sum measured by interest has been allowed. The cases in which this is true are not all cases which can be summarily dismissed as cases of taking under the power of eminent domain (see cases cited, p. 37 *supra*). For example, in *Grays Harbor Motorship Corp.* v. *United States,* 71 C. Cls. 167, *Nitro Powder Co.* v. *United States,* 71 C. Cls. 369 and *Wheeling Steel Corp.* v. *United States,* 71 C. Cls. 571, the acts of the United States in cancelling or suspending contracts were acts of breach of contract permitted by statutory provisions on the condition that just compensation be paid for the breach. Recovery of a sum measured by interest was awarded in each case. The refusal of the United States to perform a contract, even though sanctioned by statutory authority, can hardly be said to constitute a taking by the power of eminent domain, as such a taking has been generally understood.

Accordingly, we submit that wherever Congress has made the measure of recovery just compensation, a sum measured by interest must be allowed. It would seem strange for a court to hold that the words "just compensation" in the Fifth Amendment call for one measure of recovery and that precisely the same words in an Act of Congress call for a different type of recovery.

That "just compensation" must be given a uniform interpretation whether used in the Constitution or in Acts of Congress was recognized by the Court of Claims in

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[1]We exclude from this statement, of course, cases in which this Court has held that the delay in payment was occasioned solely by the claimant's failure to accept adequate payment tendered.

Virginia Engineering Co., Inc. v. *United States,* 89 C. Cls. 457. The special jurisdictional act in that case specifically provided for judgment for just compensation, even though the action was clearly one for breach of contract. The Court of Claims decided that Congress had acted in the light of repeated judicial interpretation of the phrase "just compensation" and that a sum measured by interest was an inherent part of the recovery to be awarded. The Government did not petition for a review of that decision. Congress has since appropriated for the payment of this judgment including a sum measured by interest. The construction placed by the Court of Claims on the words "just compensation" has thus been approved.

There is no conflict between the *Virginia Engineering Co.* decision and that in *Squaw Island Freight Term. Co.* v. *United States,* 89 C. Cls. 269. The special jurisdictional act in the latter case authorized the court to render judgment for "just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike" (p. 277, footnote). The court denied interest because the recovery awarded was not for just compensation but under the alternative clause for damages. In denying interest, the Court said (p. 278):

> ". . . but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiffs' property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred."

All of the decisions in which just compensation is the measure of recovery have awarded a sum measured by interest as a part of such recovery. These precedents were properly followed by the Court of Claims in the present case.

The Government urges that the opinion in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, indicates that this Court did not treat the phrase "just compensation" in a Congressional Act as requiring the addition of a sum measured by interest. This Court pointed out, in the language quoted by the Government, that there was no specific provision for interest in Section 10 of the Lever Act. With this conclusion no one, of course, can disagree. But the opinion of this Court indicates clearly that the provision for just compensation in the Lever Act was regarded as synonymous with the requirement set out in the Fifth Amendment. This Court said (p. 305):

> "It is not suggested in this case that the provisions of § 10 of the Lever Act do not meet the constitutional requirement."

And the Court concluded that the phrase "just compensation" in the Lever Act was synonymous with the same phrase as used in the Fifth Amendment and accordingly directed payment of a sum measured by interest. That decision is wholly consistent with our contention that the phrase "just compensation" in the special jurisdictional act must be similarly construed.

In none of the cases referred to by the Government in which interest was not allowed against the United States did the special jurisdictional act under which suit was brought provide for a recovery of just compensation. In *Boston Sand Co.* v. *United States*, 278 U. S. 41, 46, the di-

rection was to enter judgment "for the amount of the legal damages sustained." The special jurisdictional act in *United States* v. *Commonwealth Line,* 278 U. S. 427, 428, was similar to but even more limited than the Act in the *Boston Sand Co.* case. In *Nantasket Beach Steamboat Co.* v. *United States* (D. C. Mass.), 297 Fed. 656, 657, the Act likewise provided for the determination of the amount "of the legal damages sustained". In *Pennell* v. *United States,* (D. C. Maine) 162 Fed. 75, 76-77, the amount of recovery was also stated in terms of damages. The decision in *Cherokee Nation* v. *United States,* 270 U. S. 476, only held that no more interest was due on Indian claims than had previously been allowed. In *Tillson* v. *United States,* 100 U. S. 43, 45, no interest was allowed because the jurisdictional act merely authorized the court to decide the "amount equitably due . . . for such loss or damage . . .".

CONCLUSION

On the appeal of the United States the judgment below should be affirmed. On the appeal of cross-appellants the judgment below should be reversed with directions to consider the additional factors above set forth in points First and Second in arriving at an award of just compensation.

Respectfully submitted,

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APPENDICES

APPENDIX A

73D CONGRESS
2d Session

REPORT
No. 828

HOUSE OF REPRESENTATIVES

EDWARD F. GOLTRA

FEBRUARY 22, 1934.—Committed to the Committee of the Whole House and ordered to be printed

MR. BROWNING, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 4398]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4398) conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, after consideration, reports the same favorably to the House with amendments, with the recommendation that the bill as amended do pass.

The committee amendments are as follows:

Page 2, line 6, after the word "apparatus" insert the following words: "but no suit shall be brought after the expiration of one year from the effective date of this act".

Page 2, line 11, after the word "Court" insert the word "of".

There is attached hereto and made a part of this report a communication, addressed to the Chairman of the Committee on the Judiciary, in which the Attorney General states:

From the investigation made it appears that Goltra has never had his day in court. He has exhausted all the or-

dinary means of obtaining a hearing. The Court of Claims is the only forum in which he can now be heard, and the passage of this bill is the only method by which he can enter that forum.

The Attorney General's letter, above referred to, is as follows:

DEPARTMENT OF JUSTICE,
OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., January 16, 1934.

Hon. HATTON W. SUMNERS,
Chairman Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. SUMNERS: In reply to your letter of June 8, 1933, requesting a report and recommendation with reference to H. R. 4398, conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, I beg to advise that I have caused the records and files of this Department to be examined and find from such examination:

On May 28, 1919, Mr. Goltra entered into a contract with the United States by the terms of which he was to operate upon the Mississippi River and its tributaries a fleet of 19 barges and 4 towboats built and owned by the Government. About 8 months after the delivery of the fleet to Mr. Goltra the boats and barges, or a part of them, were seized by a United States Army officer acting under direction of the Acting Secretary of War. A great deal of litigation ensued. The first legal proceeding was an injunction suit brought by Mr. Goltra against the Secretary of War and the Army officer who seized the fleet. Upon hearing, a temporary injunction was issued, and appeal was taken to the Circuit Court of Appeals where the lower court was reversed on the ground that the United States was a neces-

sary party; and on certiorari to the Supreme Court a decision adverse to Mr. Goltra was rendered. Subsequent proceedings in the courts of the District of Columbia and before the Departments were disposed of without hearing upon the merits, it being deemed that the decision of the Supreme Court had finally disposed of the entire matter.

The hearing in the Supreme Court was on an appeal from an order directing the issuance of a temporary injunction. The testimony in the trial court was directed to the propriety of issuance of a temporary injunction, and the principal issue was one of jurisdiction—i.e., whether the United States was a necessary party to the suit. At the hearing in the lower court a letter from the Secretary of War canceling Goltra's contract and ordering the return of the fleet and written before the seizure, was offered and admitted in evidence; also a similar letter signed by the Chief of Engineers, but written more than a month after the seizure, was offered in evidence but excluded by the trial court as self-serving. This letter of the Chief of Engineers, although excluded as evidence by the trial court, of course appeared in the record.

The contract with the Government under which Goltra had possession of the fleet provided that non-compliance in the judgment of the lessor with any of the terms or conditions of the contract would justify terminating the lease and returning the fleet to the lessor. By the terms of the contract (and it was so held by the Supreme Court), the Chief of Engineers was the "lessor" and was the party designated and authorized to cancel the contract.

The Supreme Court held that the circuit court of appeals was in error in holding that the United States was a necessary party to the litigation, but reversed the lower court's order granting the preliminary injunction and directed judgment against the plaintiff Goltra. The judgment of the Supreme Court in effect was that inasmuch as the record showed that the contract had been in fact canceled by the Chief of Engineers, it would be a futile thing to re-

turn the fleet to Goltra and then Goltra turn it back to the Government. The holding of the Supreme Court is that there must be good faith in the exercise of the judgment of the lessor in declaring and effecting the cancelation, and recites that there is nothing in the nature of lack of good faith shown; that the right of the lessor to take over the fleet under the forfeiture provision of the contract is clear "unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence." It is thus clear that the judgment of the Supreme Court was based upon the bona fides of this letter of the Chief of Engineers and its having been written by him in the exercise of his judgment. (*Goltra* v. *Weeks, Secretary of War*, 271 U. S. 536.)

As this letter was excluded by the trial court when offered in evidence, there was no occasion or opportunity for Goltra then to show the facts as to its execution.

Since the rendition of the judgment in the Supreme Court the Chief of Engineers under oath by deposition in an action in the Supreme Court of the District of Columbia testified that he had not written the letter, and did not know who was the author of it; that the letter was laid on his desk for signature; that he protested against signing it; that he had no information as to the subject matter of the letter; that the Army officer under him located at St. Louis where the fleet had headquarters and whose duty it was to report to the Chief of Engineers as to any breach or violation of the terms of the contract by Goltra, had not reported any such violation or breach; that he, the Chief of Engineers, was advised that the signing of the letter by him was compulsory, being a military order from his superior officer, and that he signed it, not in the exercise of his judgment, but because he was ordered so to do by the Secretary of War.

The Supreme Court very naturally and properly took it for granted that this letter-notice of cancelation was bona fide and everything it purported on its face to be.

The Supreme Court had no reason, even remotely, to infer or suspect that this letter was not in truth and fact an expression of the Chief of Engineers' judgment formed and expressed in such manner as to constitute a proper cancelation under the contract.

The logical effect of assuming the bona fides of th letter was to dispose of the case upon its merits. The fil show that the Solicitor General and the attorneys on both sides of the case understood the proceedings were merely interlocutory—a question of the issuance of a temporary injunction, and the principally contested issue one of jurisdiction. When the mandate of the Supreme Court reversing the case reached the trial court, that court in sustaining a motion to dismiss an amended petition, said:

"If I can still read English (and I am dominated by an hallucination that I can), the Supreme Court clearly decided the merits of this case on the appeal from this Court, from the order by this Court granting a temporary injunction. No language can be plainer upon that point than the language used by the Supreme Court itself. Whether it intended to do it or not; whether under the case and facts before it, according to the ancient practice and procedure, it has a right to do it or not is outside of the question. Perhaps it did not intend to do so. But, nevertheless, it did so in plain and unmistakable language.

". . . It is true that I am now, and have always been, of the same impression that counsel for defendant seems to have been when he filed his brief, and of the impression held by counsel for plaintiff, that there has never been in this case any hearing whatever upon the merits. It was tried here upon the rule to show cause why a temporary injunction should not be granted. Incidentally, of course, as is always necessary in an application for a temporary injunction, some of the facts came up as evidentiary facts and were put forward as reasons why a temporary injunction should be granted. But never has there been a submission here on the merits; never has there been a trial on

the merits. There is not a minute, I venture to say, there is not a record, I venture to say, in all the records of this Court, in this case, that shows a submission of this case upon its merits, or a trial of it upon its merits. Clearly, the Supreme Court by its opinion cleaned up everything there is in this case. I repeat, it may not have intended to do so, but it just as effectually did it as if it had intended to do it. I am bound by what it says. In effect, it had before it the same bill that I had before me; that is to say, a bill for a temporary injunction, and upon final hearing on the merits a bill asking for a perpetual injunction. That is exactly what is here."

It is thus obvious that Goltra's claims have never been presented to or heard by any court upon their merits. The files show that Goltra has attempted to secure an adjudication of his claim both in the courts and before the Department since the rendition of the opinion in the Supreme Court, but that decision has effectually prevented any consideration of his claim.

From the investigation made it appears that Goltra has never had his day in court. He has exhausted all the ordinary means of obtaining a hearing. The Court of Claims is the only forum in which he can now be heard, and the passage of this bill is the only method by which he can enter that forum.

Respectfully,

HOMER S. CUMMINGS,
Attorney General.

The Committee on the Judiciary reported a similar bill in the Seventy-second Congress. The committee report, which explains the circumstances under which Mr. Goltra's claims arise, is attached hereto and made a part of this report, as follows:

[House Report No. 1426, Seventy-second Congress, first session]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6425) conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The committee amendments are as follows:

Page 2, line 2, strike out "tortously" and insert in lieu thereof the word "tortiously".

Page 2, line 8, after the word "appeal" insert the following words: "as of right".

It appears from the information furnished the committee that the claim of Edward F. Goltra has never been tried upon the merits. The trial judge, in dismissing the complaint after the decision of the Supreme Court, hereinafter referred to, said:

"It is true that I am now, and have always been, of the same impression that counsel for defendant seems to have been when he filed his brief, and of the impression held by counsel for plaintiff, that there has never been in this case any hearing whatever upon the merits. It was tried here upon the rule to show cause why a temporary injunction should not be granted. Incidentally, of course, as is always necessary in an application for temporary injunction, some of the facts came up as evidentiary facts and were put forward as reasons why a temporary injunction should be granted. But never has there been a submission here on the merits; never has there been a trial on the merits. There is not a minute, I venture to say; there is not a record, I venture to say, in all the records of this court, in this case, that shows a submission of this case upon its merits, or a trial of it upon its merits."

An appeal from an order granting a preliminary injunction was carried to the Supreme Court of the United States

and that Court not only reversed the order granting the preliminary injunction, but directed judgment absolute against the plaintiff, Edward F. Goltra. It is clear that the Court was led to this action by reason of the inclusion in the record of appeal of a letter from Maj. Gen. Lansing H. Beach, Chief of Engineers of the War Department at the time, who was lessor under the terms of the lease, stating that in his judgment (the Chief Engineer's), Goltra had failed to carry out the terms of his lease.

Section 8 of the contract of lease provided as follows:

"The lessor reserves the right to inspect the plant, fleet, and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and non-compliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels."

The opinion of the Supreme Court given by Mr. Chief Justice Taft at the close stated (*Goltra* v. *Weeks*, 271 U. S. 536, 550):

"The right of the lessor to take over the fleet under section 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor."

There was, of course, no reason for the court to suppose that the letter of General Beach declaring that in his judgment Goltra had not complied with the terms of the lease, was not bona fide and entitled to full credence. It appears, however, from the sworn testimony of General Beach subsequently taken in aid of Goltra's claim on the 14th of November, 1929, that General Beach did not exer-

cise his judgment in the matter, never made any investigation of the facts to determine the accuracy or inaccuracy of the statement that Goltra had or had not complied with the terms of his lease and signed the letter in question, used upon the hearing for a preliminary injunction, pursuant to the instructions of the War Department which he was advised by counsel representing the Department was a military order with which he was obliged to comply, irrespective of the fact that he himself had arrived at no conclusion whatsoever in the matter and despite the fact that he himself protested against signing such a letter, not written by him and not expressing his own views.

It further appears that from the time the fleet was turned over to Goltra and during the period of his possession of the same the Chief of Engineers, the lessor, was represented in the St. Louis district by Maj. Lundsford E. Oliver, upon whom developed the duty of observer for the Department, charged, among other things, with seeing that the terms of the lease were complied with by Goltra. Major Oliver was never called upon to give his testimony, although it would appear that he was in the best position of anyone in the Government service to testify with respect to the performance or nonperformance by Goltra of the terms of the lease.

We are advised that one of the Members of the House, Hon. Henry T. Rainey, of Illinois, wrote Major Oliver requesting an answer to the following questions:

"1. Were you the engineer officer at St. Louis, Mo., charged with seeing that Edward F. Goltra complied with the terms of a certain contract he had for the lease of 19 Government barges and 4 Government towboats?

"2. Did you make delivery to him of the aforesaid barges and boats?

"3. Were you continuously at your post during his operation of the same?

"4. Did he operate said boats and barges in compliance with the terms of his contract so far as the limitations placed on him by the Secretary of War permitted?"

to which Major Oliver replied under date of April 7, 1932:

"Answering your questions in order:

"1. I was the engineer officer at St. Louis, Mo., charged with seeing that Edward F. Goltra complied with the terms of a certain contract he had for the lease of 19 Government barges and 4 Government towboats.

"2. I made delivery to him of the aforesaid barges and boats. Among other duties, I made an inspection of the fleet each month after delivery had been made in order to see that Mr. Goltra kept the said fleet in good condition.

"3. I was continuously at my post during the time that Mr. Goltra had possession of the fleet. I may have been away on a leave of absence for as much as a week or so at some time during this period, but, if so, no one relieved me of my duties during such period.

"4. In my opinion Mr. Goltra operated the said boats and barges in compliance wi. . . e terms of his contract so far as the limitations placed on him by the Secretary of War permitted."

Immediately after the termination of the litigation in the action for an injunction, Goltra, upon the advice of his St. Louis counsel, commenced an action for damages in the district court for the District of Columbia against the Inland Waterways Corporation, a corporation created by act of Congress to take over the inland waterways activities of the Government, including the towboats and barges leased to Goltra. The circuit court of appeals held (*Goltra* v. *Inland Waterways Corporation,* 49 Fed. (2d) 497) that no action lay against such corporation. In the meantime it would appear that the statute of limitation had run against Goltra, thus barring the commencement of an ac-

tion against the United States in the Court of Claims. The rules of the Court of Claims forbid the pendency of any other suit for the same relief, so Goltra was precluded from commencing both an action in the Court of Claims against the United States and an action in the district court against the Inland Waterways Corporation.

Upon the foregoing facts we have reached the conclusion that Goltra has never had his day in court with respect to his claims, to which he is in justice entitled, and your committee therefore recommends the enactment of the proposed bill.

CALENDAR NO. 392

73D CONGRESS
2d Session

REPORT
No. 362

SENATE

CONFERRING JURISDICTION ON THE COURT OF CLAIMS TO CONSIDER AND DISPOSE OF CERTAIN CLAIMS OF EDWARD F. GOLTRA.

FEBRUARY 20 (calendar day FEBRUARY 26), 1934.—Ordered to be printed

Mr. STEPHENS, from the Committee on the Judiciary submitted the following

REPORT

[To accompany S. 1091]

The Committee on the Judiciary, having had under consideration the bill (S. 1091) conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, reports the same favorably to the Senate and recommends that the bill do pass.

The purpose and propriety of this legislation are fully set out in the following letter from the Attorney General to the chairman of this committee:

JUSTICE DEPARTMENT,
Washington, D. C., January 20, 1934.

Hon. HENRY F. ASHURST,
Chairman Committee on the Judiciary,
United States Senate, Washington, D.C.

DEAR SENATOR ASHURST: In reply to your letter of June 16, 1933, requesting a report and recommendation with reference to S. 1091, Seventy-third Congress, first session, conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus, I beg to advise that I have caused the records and files of this Department to be examined and find from such examination:

[The body of this letter is identical with that addressed to Hon. Hatton W. Sumners printed above pp. ii-vi].

For your further information I am attaching hereto photostat copies of deposition of Maj. Gen. Lansing H. Beach, taken in a case then pending in the Supreme Court of the District of Columbia, and of statement of Maj. Lunsford E. Oliver, before the House of Representatives Special Committee to Investigate Government Competition With Private Enterprises; together with copy of four questions asked of Major Oliver by Hon. Henry T. Rainey, of Illinois, and the replies thereto made by Major Oliver.

Respectfully,

HOMER S. CUMMINGS,
Attorney General.

[Here follow the questions propounded by Hon. Henry T. Rainey and the answers of Major Oliver, printed above pp. ix-x].

APPENDIX B

First Cause of Action

First Calculation

1 Period of Lease (1)	2 Net Rental Value Barges (2)	3 Net Rental Value Towboats (3)	4 Total Net Rental Value of Fleet (4)
March 25, 1923—July 14, 1923.	$229,100.67	$108,566.88	$ 337,667.55
July 15, 1923—July 14, 1924.	753,350.00	357,000.00	1,110,350.00
July 15, 1924—July 14, 1925.	753,350.00	357,000.00	1,110,350.00
July 15, 1925—July 14, 1926.	753,350.00	357,000.00	1,110,350.00
July 15, 1926—July 14, 1927.	753,350.00	357,000.00	1,110,350.00

Total productive value of fleet from date of seizure to end of lease period.... $4,779,067.55

Second Calculation

Total net rental during unexpired period of lease as calculated above in this appendix.....		$4,779,067.55	
To be paid to credit of Secretary of War as purchase price of fleet (principal) (see contract provisions, R. 17-19, and R. 66-67)	$3,590,000.00		
Accrued interest from delivery date of fleet, July 15, 1922, to date of full payment—approximately 4 years from delivery date (5)	441,158.00		
Total payments to Secretary of War.....		4,031,158.00	
Net rental after payment of principal and interest for purchase of fleet....			$ 747,909.55
Depreciated value of fleet which would belong to plaintiff after above payments (6) (R. 17-19)			3,231,000.00

(1) By terms of contract, the lease was to run five years (disregarding the option) from the date of delivery of the equipment to plaintiff (R. 16), which was all delivered on July 15, 1922 (Finding 15, R. 34).

(2) The annual net rental value of the 19 barges is calculated on the basis of $\frac{1}{10}$ of 1% per day (R. 66, 67, 68-72) of cost of barges (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: \$110,000 (cost per barge) × 19 (number of barges) × $\frac{1}{10}$ of 1% (percentage of cost) × 365 (days) — \$9,500 (\$500 × 19 overhaul charge) = \$753,350. The daily net rental is \$753,350 ÷ 365 = \$2,063.97. The first figure in this column is the daily net rental of 19 barges for 111 days (from seizure on March 25, 1923, through July 14, 1923, *i.e.*, \$2,063.97 × 111).

(3) The annual net rental value of the 4 towboats is calculated on the basis of $\frac{1}{15}$ of 1% per day (R. 66, 67, 68-72) of cost of towboats (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: \$375,000 (cost per towboat) × 4 (number of towboats) × $\frac{1}{15}$ of 1% (percentage of cost) × 365 (days) — \$8,000 (\$2,000 × 4 overhaul charge) = \$357,000. The daily net rental is \$357,000 ÷ 365 = \$978.08. The first figure in this column is the daily net rental of 4 towboats for 111 days (from seizure on March 25, 1923, through July 4, 1923, *i.e.*, \$978.08 × 111).

(4) This column is an addition of figures in Columns 2 and 3.

(5) The contract provided for payment of accrued interest from date of delivery of fleet on unpaid portions of purchase price (R. 17-19). On the basis of rental value, the cost of the fleet and interest would all be repaid no later than approximately July 15, 1926. Interest at 4% on the entire principal sum of \$3,590,000 is included in the interest figure for the first two years of this period. Thereafter the interest figure includes 4% only on the unpaid balance of the purchase price.

(6) At the date of seizure, the fleet had a remaining useful life of thirty years (R. 73); the yearly depreciation would therefore be 3.33%. On the basis of above rental figures it would take about three years from date of seizure to deposit a sum sufficient to pay for the fleet (R. 17-19). Depreciation for this period would be 10% or \$359,000, leaving a value after depreciation of \$3,231,000 (\$3,590,000 less \$359,000).

APPENDIX C

First Cause of Action

1	2 Net Rental Value Barges (1)	3 Net Rental Value Towboats (2)	4 Total Net Rental Value of Fleet (3)	
Reconstruction of fleet would have taken at least two years after letting of contracts (R. 66, 67); net rental value for each year would be.....	$753,350.00	$357,000.00	$1,110,350.00	
	753,350.00	357,000.00	1,110,350.00	
Total net rental value of fleet during time necessary to replace it.....				$2,220,700.00
To acquire capital to reconstruct fleet on basis of repayment in fifteen equal annual installments similar to payment terms of contract with defendant (R. 19), plaintiff would have had to pay interest of at least 6.138 per cent. on unpaid installments (R. 74) as against 4 per cent. under contract with defendant (R. 19). This difference in rate of 2.138 per cent. on paid installments over the fifteen-year period would be (4).....				614,033.59
TOTAL				$2,834,733.59

(1) The annual net rental value of the 19 barges is calculated on the basis of 4/10 of 1% per day (R. 66, 67, 68-72) of cost of barges (R. 66) multiplied by 365 days.

68). The formula is as follows:

$110,000 (cost per barge) × 19 (number of barges) × 1/10 of 1% (percentage of cost) × 365 (days) — $9,500 ($500 × 19 overhaul charge) = $753,350.

The daily net rental is $753,350 ÷ 365 = $2,063.97. The figures in this column are the annual net rental of the charges for two annual periods and for one sixty day period, the latter arrived at by multiplying the daily net rental of $2,063.97 by 60.

(2) The annual net rental value of the 4 towboats is calculated on the basis of 1/15 of 1% per day (R. 66, 67, 68-72) of cost of towboats (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows:

$375,000 (cost of towboat) × 4 (number of towboats) × 1/15 of 1% (percentage of cost) × 365 (days) — $8,000 ($2,000 × 4 overhaul charge) = $357,000.

The daily net rental is $357,000 ÷ 365 = $978.08. The figures in this column are the annual net rental of the towboats for two annual periods and for one sixty day period, the latter arrived at by multiplying the daily net rental of $978.08 by 60.

(3) This column is an addition of figures in the two preceding columns.

(4) This sum is calculated as follows:

1st year	$3,590,000.00	×	.02138	equals	$76,754.20
2nd "	3,350,666.67	×	.02138	"	71,637.25
3rd "	3,111,333.33	×	.02138	"	66,520.30
4th "	2,872,000.00	×	.02138	"	61,403.36
5th "	2,632,666.67	×	.02138	"	56,286.41
6th "	2,393,333.33	×	.02138	"	51,169.47
7th "	2,154,000.00	×	.02138	"	46,052.52
8th "	1,914,666.67	×	.02138	"	40,935.57
9th "	1,675,333.33	×	.02138	"	35,818.63
10th "	1,436,000.00	×	.02138	"	30,701.68
11th "	1,196,666.67	×	.02138	"	25,584.73
12th "	957,333.33	×	.02138	"	20,467.79
13th "	718,000.00	×	.02138	"	15,350.84
14th "	478,666.67	×	.02138	"	10,233.89
15th "	239,333.33	×	.02138	"	5,116.95
	$28,719,999.50				$614,033.59

APPENDIX D

First Cause of Action

Year Ended March 25	Net Rental of Barges (2)	Net Rental of Towboats (3)	Total Net Rental	Principal Payments to Defendant Under Contract (4)	Interest Payments to Defendant Under Contract (5)	Total Payments to Defendant Under Contract	Annual Net Return to Plaintiff
1924 (1)	$753,350.00	$357,000.00	$ 1,110,350.00	$239,333.33	$ 143,600.00	$382,933.33	$727,416.67
1925	753,350.00	357,000.00	1,110,350.00	239,333.33	134,026.66	373,359.99	736,990.01
1926	753,350.00	357,000.00	1,110,350.00	239,333.33	124,453.33	363,786.66	746,563.34
1927	753,350.00	357,000.00	1,110,350.00	239,333.33	114,880.00	354,213.33	756,136.67
1928	753,350.00	357,000.00	1,110,350.00	239,333.33	105,306.66	344,639.99	765,710.01
1929	753,350.00	357,000.00	1,110,350.00	239,333.33	95,733.33	335,066.66	775,283.34
1930	753,350.00	357,000.00	1,110,350.00	239,333.33	86,160.00	325,493.33	784,856.67
1931	753,350.00	357,000.00	1,110,350.00	239,333.33	76,586.66	315,919.99	794,430.01
1932	753,350.00	357,000.00	1,110,350.00	239,333.33	67,013.33	306,346.66	804,003.34
1933	753,350.00	357,000.00	1,110,350.00	239,333.33	57,440.00	296,773.33	813,576.67
1934	753,350.00	357,000.00	1,110,350.00	239,333.33	47,866.66	287,199.99	823,150.01
1935	753,350.00	357,000.00	1,110,350.00	239,333.33	38,293.33	277,626.66	832,723.34
1936	753,350.00	357,000.00	1,110,350.00	239,333.33	28,720.00	268,053.33	842,296.67
1937	753,350.00	357,000.00	1,110,350.00	239,333.33	19,146.66	258,479.99	851,870.01
1938	753,350.00	357,000.00	1,110,350.00	239,333.33	9,573.33	248,906.66	861,443.34
			$16,655,250.00		$1,148,799.95		

Total net return to plaintiff of which he was deprived by reason of defendant's acts $11,916,456.05

Depreciation of fleet costing $3,590,000 (R. 66) from January 1, 1923, to December 31, 1937, assuming useful life of 30 years (R. 73) would be 50% $1,795,000.00

Cost of fleet	$3,590,000.00
Depreciation for 15 years	1,795,000.00

(1) Each year taken on basis of 365 days.

(2) The annual net rental value of the 19 barges is calculated on the basis of 1/10 of 1% per day (R. 66, 67, 68-72) of cost of barges (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: $110,000 (cost per barge) × 19 (number of barges) × 1/10 of 1% (percentage of cost) × 365 (days) — $9,500 ($500 × 19 overhaul charge) = $753,350. The daily net rental is $753,350 ÷ 365 = $2,063.97.

(3) The annual net rental value of the 4 towboats is calculated on the basis of 1/15 of 1% per day (R. 66, 67, 68-72) of cost of towboats (R. 66) multiplied by 365 days less the cost of annual heavy overhaul (R. 68). The formula is as follows: $375,000 (cost per towboat) × 4 (number of towboats) × 1/15 of 1% (percentage of cost) × 365 (days) — $8,000 ($2,000 × 4 overhaul charge) = $357,000. The daily net rental is $357,000 ÷ 365 = $978.08.

(4) Calculated on requirement in original contract of 15 equal annual payments by plaintiff to defendant (R. 19).

(5) Calculated on requirement in original contract of interest of 4% per annum on all unpaid portions of purchase price (R. 19).

APPENDIX E

Second Cause of Action
First Calculation

Period of Lease (1)	Rental of Unloading Crane (2)	Rental of Land and Runways (3)	Total Rental (4)
March 25, 1923—July 14, 1923.....	$ 7,602.39	$1,824.84	$ 9,427.23
July 15, 1923—July 14, 1924.....	25,000.00	6,000.00	31,000.00
July 15, 1924—July 14, 1925.....	25,000.00	6,000.00	31,000.00
July 15, 1925—July 14, 1926.....	25,000.00	6,000.00	31,000.00
July 15, 1926—July 14, 1927.....	25,000.00	6,000.00	31,000.00

Total productive value of unloading crane, land and runways from date of seizure to end of lease period.....		$133,427.23
Rental of plaintiff's land and runways on which unloading crane was left by defendant at rate of $6,000 per year from July 15, 1927, to date (April 14, 1939, taken for convenience) eleven years, nine months.....		70,500.00
EXPENDITURES:		
Cost of runways (Finding 50, R. 46).....	$36,061.49	
Wages of watchmen to watch defendant's unloading facilities on plaintiff's runways from July, 1926, to date (April 14, 1939, taken for convenience), 153 months at $250 per month (R. 66, 68).....	38,250.00	74,311.49
Total (5).....		$278,238.72

(1) By the terms of the contract, including the supplemental contract, the lease with reference to the fleet and the unloading facilities was to run five years (disregarding the option) from the date of delivery of the equipment to plaintiff (R. 16, 22). The equipment was all delivered on July 15, 1922 (Finding 15, R. 34).

(2) The rental of the unloading crane was $25,000 per year (R. 66, 67). The first figure in this column is the daily rental of the unloading crane for 111 days (from seizure on March 25, 1923, through July 14, 1923, *i.e.*, $68.49 × 111).

(3) The rental of land and runways was $6,000 per year (Finding 51, R. 46). The first figure in this column is the daily rental of the land and runways for 111 days (from seizure on March 25, 1923, through July 14, 1923, *i.e.*, $16.44 × 111).

(4) This column is an addition of the figures in the preceding two columns.

(5) Interest should be allowed on the rental value from the end of each respective year of rental. Interest should be allowed on the expenditure of $36,061.49 from the date of seizure, March 25, 1923. With respect to the $38,250, interest should be allowed from the end of each respective calendar year with reference to the watchmen's wages paid out in the course of that year.

APPENDIX F

Second Cause of Action

Second Calculation

Year Ended March 25	Rental Unloading Crane (2)	Rental Land and Runways (3)	Total Rental	Principal Payments to Defendant Under Contract (4)	Interest Payments to Defendant Under Contract (5)	Total Payments to Defendant Under Contract	Annual Net Return to Plaintiff
1924 (1)	$25,000.00	$6,000.00	$31,000.00	$14,000.00	$8,400.00	$22,400.00	$ 8,600.00
1925	25,000.00	6,000.00	31,000.00	14,000.00	7,840.00	21,840.00	9,160.00
1926	25,000.00	6,000.00	31,000.00	14,000.00	7,280.00	21,280.00	9,720.00
1927	25,000.00	6,000.00	31,000.00	14,000.00	6,720.00	20,720.00	10,280.00
1928	25,000.00	6,000.00	31,000.00	14,000.00	6,160.00	20,160.00	10,840.00
1929	25,000.00	6,000.00	31,000.00	14,000.00	5,600.00	19,600.00	11,400.00
1930	25,000.00	6,000.00	31,000.00	14,000.00	5,040.00	19,040.00	11,960.00
1931	25,000.00	6,000.00	31,000.00	14,000.00	4,480.00	18,480.00	12,520.00
1932	25,000.00	6,000.00	31,000.00	14,000.00	3,920.00	17,920.00	13,080.00
1933	25,000.00	6,000.00	31,000.00	14,000.00	3,360.00	17,360.00	13,640.00
1934	25,000.00	6,000.00	31,000.00	14,000.00	2,800.00	16,800.00	14,200.00
1935	25,000.00	6,000.00	31,000.00	14,000.00	2,240.00	16,240.00	14,760.00
1936	25,000.00	6,000.00	31,000.00	14,000.00	1,680.00	15,680.00	15,320.00
1937	25,000.00	6,000.00	31,000.00	14,000.00	1,120.00	15,120.00	15,880.00
1938	25,000.00	6,000.00	31,000.00	14,000.00	560.00	14,560.00	16,440.00

Total net return to plaintiff of which he was deprived by reason of defendant's acts..... $187,800.00

Depreciation of unloading crane costing $210,000 (R. 66, 67)

life of 20 years would be 75%	$157,500.00	
Cost of unloading crane	$210,000.00	
Depreciation for 15 years	157,500.00	
Value of unloading crane December 31, 1937		52,500.00
		$240,300.00
EXPENDITURES:		
Cost of runways (Finding 50, R. 46)	$36,061.49	
Wages of watchmen to watch defendant's unloading facilities on plaintiff's Runways from July, 1926 to date (April 14, 1939, taken for convenience), 153 months at $250 per month (R. 66, 68)	38,250.00	
Total Expenditures		74,311.49
TOTAL ON WHICH RECOVERY OF JUST COMPENSATION UNDER SECOND CAUSE OF ACTION SHOULD BE BASED		$314,611.00

(1) Each year taken on basis of 365 days.

(2) The rental of the unloading crane was $25,000 per year (R. 66, 67). The first figure in this column is the daily rental of the unloading crane for 281 days (from seizure on March 25, 1923, through December 31, 1923, *i.e.*, $68.49 × 281).

(3) Then rental of land and runways was $6,000 per year (Finding 51, R. 46). The first figure in this column is the daily rental of the land and runways for 281 days (from seizure on March 25, 1923, through December 31, 1923, *i.e.*, $16.44 × 281).

(4) Calculated on requirement in original contract of 15 equal annual payments by plaintiff to defendant (R. 19) made applicable to unloading crane (R. 22).

(5) Calculated on requirement in original contract of interest of 4 per cent. per annum on all unpaid portions of purchase price made applicable to unloading crane (R. 22).